The Administrative decisions are based on the so called "marketability at a profit" test and the Common Varieties Act. (30 U.S.C. 611.)

The Supreme Court of the United States in its decision of April 22, 1968, *United States v. Alfred Coleman,* states that the "Marketability at a Profit" test is "* * * a logical complement to the 'prudent man test' * * *". This new test is then an addition or amendment to the prudent man rule, and under the Administrative Procedure Act (5 U.S.C. §552) (originally passed in 1946) should have been published in the Federal Register and Code of Federal Regulations.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time, almost every year. They are entitled "Lode and Placer Mining Regulations". Appellees procured one such pamphlet before starting their locations in 1952. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit". One pamphlet is entitled: "Mining Claims; Questions and Answers". It is dated 1963. We quote from the bottom of page 3 and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. *Commercial grade ore is not required* but mere traces, isolated bits of mineral or minor indications are not sufficient to satisfy the 'prudent man' rule." (Emphasis added).

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit". We call attention to the following language in the above quotation: "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit".

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

In the various pamphlets referred to, a careful examination will show that "marketability at a profit" is not referred to, so that the public knows nothing about it after reading the government pamphlets and, based thereon, locating mining claims under the old, well known, "prudent man" test.

The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States in a number of cases; one of the latest decisions being *Best v. Humbolt Placer Mining Company,* 371 U.S. 334 (Jan. 14, 1963), with no reference to "marketability at a profit".

The "marketability at a profit" test being an addition to the "prudent man rule" in order to be of legal effect must have been published in the Federal Register as provided by the Administrative Procedure Act, 5 U.S.C. §552(a)(1), particularly subsection E which provides that:

> "* * * each amendment, revision or repeal of the foregoing"

must be so published.

Said §552 further provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Since the "marketability at a profit" test was not published by the Department of the Interior in the Federal Register to inform the public how to locate mining claims on the public domain; is not publicized in pamphlets; said test is illegal and ineffective as to Dredge Corporation's mining claims in these cases.

II.

The phrase "marketability at a profit is unconstitutional because it is vague, indefinite and uncertain.

What does "market" mean, and what does "profit" mean in the additional clause "marketability at a profit" which the Department has added to the prudent man rule? The term is vague, indefinite and uncertain.

The Supreme Court of the United States has repeatedly declared laws invalid because they are vague and uncertain. In the term of that court just closed there are at least two cases which decide this question.

(a) *Zwickler v. Koota,* 389 U.S. 241 (Dec. 5, 1967), 88 S. Ct. Rptr. 391.

(b) *Interstate Circuit Inc. v. City of Dallas,* decided April 27, 1968, 88 S. Ct. Rptr. 1299, 1303.

For another late case on vagueness, see *Keyishian v. Regents of New York University,* in connection with the New York loyalty oath law, 385 U.S. 589, 87 S. Ct. Rptr. 675 (decided January 1967).

Every requirement and condition of the mining laws are spelled out with exactitude except "marketability at a profit."

For example a lode claim is 600 feet wide by 1500 feet long by statute. Location work to perfect the claim requires 240 cubic feet of mineral be removed in the discovery pit.

A placer claim is 20 acres in extent. Association placer mining claims may be not more than 160 acres for eight locators.

Annual assessment work to hold title to a lode or placer claim must be $100.00 per year and an affidavit recorded showing the annual work has been performed.

To qualify a lode or placer claim for patent requires that $500.00 worth of development work must have been performed.

There is nothing vague, indefinite or uncertain in these requirements and conditions to comply with Federal and state mining laws.

Now as to "marketability at a profit" what needs to be shown to qualify a lode or placer mining claim for patent?

Inasmuch as $500.00 worth of *development* work is required to qualify a lode or placer claim for patent would this sum as profit meet the requirements?

Would profit for one year be sufficient to satisfy the "marketability at a profit" rule, or must the term be five years, ten years or more?

Will profit in excess of $500.00 be required and if so how much—$1000.00, $5000.00 or $50,000.00? No one knows the answers to these simple questions, therefore the term "marketability at a profit" is not only illegal because never published in the Federal Register, in the Code of Federal Procedure or in pamphlets it is also unconstitutional and void because it is vague, uncertain and indefinite.

III.

Can the Common Varieties Act (30 U.S.C. 611) be applied to mining claims located prior to its passage?

The act provides saving clauses for mining claims located *prior* to its passage.

No law can be applied retroactively unless it contains a provision authorizing such retroactive application.

The Common Varieties Act (30 U.S.C. 611) does not contain any provision for retroactive application. On the contrary the act contains a saving clause (repeated in many Sections) protecting mining claims located prior to its passage.

IV.

In the case of *Emil L. Krushnic v. U.S.,* 280 U.S. 305 (1930) this court stated:

> "The rule has been established by innumerable decisions of this court, and of state and lower Federal Courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term. . . .".

In view of the above to permit this Dept. of Interior to deprive Petitioner of its mining claims (property) without compensation is unconstitutional and a denial of due process of law.

V.

Reasons for Granting the Writ.

The decisions below should be reviewed because they erroneously overlook the requirements of the Administrative Procedure Act, 5 U.S. Code, Section 552, particularly subsection E which provides that ". . . each amendment, revision or repeal of the foregoing must be published in the Federal Register." This would include the so called "Marketability at a profit" rule.

Also Section 1002 of said act passed in 1946 further provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ."

The Courts below have erroneously overlooked that the so-called "Marketability at a profit" requirement is unconstitutional because it is vague, indefinite and uncertain.

The Courts below have erroneously overlooked the saving clause in the Common Varieties Act (30 U.S.C. Sec. 611) which exempts from provisions of the act mining claims located prior to its passage.

Finally the Courts below have failed to realize that the Petitioner's Constitutional rights have been violated

by taking its property (mining claims) without compensation and without due process of law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX A.

The Common Varieties Act of July 23, 1955.

Title 30 U.S.C. 611: (July 23, 1955, c. 375, sec. 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652.)

Sec. 611. COMMON VARIETIES OF SAND, STONE, GRAVEL, PUMICE, PUNICITE, OR CINDERS, AND PETRIFIED WOOD

No deposit of common varieties of sand, stone, gravel, pumice, punicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity *to any mining claim hereafter located under such mining laws: Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common Varieties" as used in sections 601, 603 and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the placement of wood by silica or other matter. (Emphasis added.)

The following sections of the Act also limit the law to "mining claim hereafter located". Sec. 612(a)(b)(c).

Section 615 contains provisions protecting the rights of claimants of mining claims located prior to the passage of the Common Varieties Act on July 23, 1955.

APPENDIX B.

5 U.S.C.—Chapter 5—Administrative Procedure Act

§552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this

paragraph to be made available or published. (A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

E. J. Palmer, State Supervisor, Bureau of Land Management and James E. Keogh Jr., Manager of Reno, Nevada, Land Office, Bureau of Land Management, Department of the Interior, *Appellants,* vs. The Dredge Corporation, a Nevada corp., *Appellee.* No. 21,435.

J. Russell Penny, State Supervisor, Bureau of Land Management, and Harold C. Hammitt, Manager of Reno, Nevada, Land Office, Bureau of Land Mangement, Department of the Interior, and John Does 1-300 and Jane Does 1-300, inclusive, *Appellants,* vs. The Dredge Corporation, a Nevada corp., *Appellee.* No. 21,436.

[June 26, 1968]

Appeal from the United States District Court for the District of Nevada.

Before: Barnes, Hamley and Browning, Circuit Judges.

Hamley, Circuit Judge:

These are consolidated appeals from judgments entered in companion district court cases involving the validity of thirty-six sand and gravel mining claims located on public lands. All of the claims are owned by The Dredge Corporation (Corporation), which is the plaintiff and appellee in each case.

Twenty-eight of the claims are involved in a suit in which E. J. Palmer, Nevada State Supervisor, Bureau

of Land Management (Bureau), United States Department of the Interior (Department), and others, are defendants and appellants. The remaining eight claims are involved in a suit in which J. Russell Penny, a successor state supervisor of the Bureau, and others, are defendants and appellants.[1]

All of the claims, based on the asserted discovery of sand and gravel deposits, were located on various dates ranging from July 12 to July 28, 1952. In order for these claims to be valid it is necessary that the discovered mineral deposits be "valuable." Rev. Stat. 2319 (1875), 30 U.S.C. § 22 (1964). The Secretary of the Department is charged with seeing that valid claims are recognized, invalid ones are eliminated, and the rights of the public preserved. *Cameron v. United States,* 252 U.S. 450, 460.

In fulfillment of this responsibility, a contest proceeding was initiated before the Bureau on October 4, 1955, involving the twenty-eight claims embraced in the Palmer case. In the charges it was alleged, among other things, that minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery. On December 18, 1957, a similar contest proceeding was instituted involving the eight claims embraced in the Penny case.

In determining the validity of these claims the critical question of fact was whether the discovered deposits of sand and gravel were "valuable" within the meaning of 30 U.S.C. § 22. The general test applied by the examiner in ascertaining whether the deposits were valuable

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[1]The two cases will be referred to herein as the Palmer and Penny cases.

was the "prudent man" test which the Secretary has been using since 1894.[2] As a further refinement of the test, the examiner held, relying on *Layman v. Ellis,* 52 L.D. 714 (1929), and subsequent opinions of the Solicitor General, that in the case of a mining claim located for sand and gravel it must be shown that the deposits can be extracted, removed, and marketed at a profit—the so-called "present marketability" test.

Taking into consideration the evidence produced at the agency hearing, and applying the tests referred to above, the examiner in the contest involving the twenty-eight Palmer claims determined that twenty-two claims were null and void for lack of a valid discovery of minerals. He held that there was a valid discovery as to the remaining six claims in that case and that those claims were valid.

Both the Corporation and the Government appealed to the director of the Bureau. The director entered a decision holding that all twenty-eight claims were null and void for lack of a valid discovery of minerals, thereby affirming the examiner as to twenty-two claims and reversing him as to six. The Corporation appealed to the Secretary of the Interior (Secretary). The deputy solicitor of the Department, acting on behalf of the Secretary, affirmed the decision of the director.

In the contest involving the eight Penny claims, the examiner, appraising the evidence in the light of the

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[2]This test was first announced in *Castle v. Womble* 19 L.D 455, 457 (1894), and was there stated as follows:

> "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

tests referred to above, determined that all eight claims were null and void for lack of a valid discovery of minerals. The Corporation appealed to the director of the Bureau who entered a decision affirming the examiner's decision. The Corporation then appealed to the Secretary. The deputy solicitor, acting on behalf of the Secretary, affirmed the decision of the director.[3]

The Corporation then commenced these two actions in the United States District Court for the District of Nevada, injunctive and declaratory relief being sought. In each case defendants moved for a summary judgment, and the motions were granted. Appeals were taken and we reversed without reaching the merits, holding that plaintiffs had been denied the right of oral argument on the motions for summary judgment. *The Dredge Corporation v. Penny,* 9 Cir., 338 F.2d 456.

After the cases were returned to the district court oral argument was had on the motions for summary judgment, and the motions were denied. The cases were thereafter submitted for decision, on March 21, 1966, under the terms of a pretrial order, the administrative record, briefs and oral argument.

Before decisions were rendered by the district court, this court, on June 21, 1966, filed an opinion in *Coleman v. United States,* 9 Cir., 363 F.2d 190, adhered to on petition for rehearing, 379 F.2d 555. In that opinion, this court disapproved the Department's rule, applied by the agency in *Coleman,* and in the cases now

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[3]Before the office of the Secretary acted on the Palmer and Penny agency appeals, *Foster v. Seaton,* D.C. Cir., 271 F.2d 836, was decided, in which the Department's "present marketability" test was approved. In the Secretary's decisions in the Palmer and Penny contests *Foster v. Seaton* was therefore referred to as additional authority sanctioning such a test.

before us, that for sand and gravel deposits to be regarded as "valuable" within the meaning of 30 U.S.C. § 22, it must be shown that the mineral can presently be extracted, removed and marketed at a profit.

On the authority of the decision of this court in *Coleman,* the district court, on August 8, 1966, entered judgments for plaintiffs in the *Palmer* and *Penny* cases. The court ordered that those cases be remanded to the Department for further consideration in the light of *Coleman.* These appeals followed.

Having in view the primary basis for the district court judgments, it is not surprising that a substantial part of the briefs on appeal in the cases now before us are devoted to the question of whether our *Coleman* decision is controlling so as to require affirmance of the district court judgments. Appellee Corporation, of course, takes the position in its brief that we must affirm in the light of our opinion in *Coleman.*

Unfortunately for the Corporation, however, our *Coleman* decision was reversed by the Supreme Court just eighteen days before the oral argument on these appeals. *United States v. Coleman,* .... U.S. .... decided April 22, 1968. The Supreme Court held that the so-called "present marketability" test is a logical complement to the "prudent man" test and an appropriate way to identify, with greater precision and objectivity, the factors relevant to a determination that a mineral deposit is "valuable."

The Supreme Court decision in *Coleman* necessarily presents the *Palmer* and *Penny* appeals in a new posture, which counsel for the parties recognized at the oral argument. The prime line of contention then

switched from a discussion of the possible controlling effect of our decision in *Coleman,* to the question of whether the Secretary's decisions should be set aside on the ground that the findings of fact, on the basis of which the Secretary concluded that all of the claims are null and void, are not supported by a sufficient quantum of evidence.

As above indicated, the district court did not give specific consideration to this question, but instead decided the case on the ground that, under our decision in *Coleman,* the agency had applied an inappropriate test as to the value of the deposits. It would therefore be proper for us to remand the appeals to the district court for further consideration in the light of the Supreme Court decision in *Coleman.* Since, however, the agency record and the contentions of the parties with respect to the sufficiency of the evidence are fully before us, and in view of the length of time which has transpired since the Palmer and Penny contest proceedings were initiated in 1955 and 1957, we elect to proceed with the appeals and determine all of the issues at this time.

The Government argues that the decisions of the Secretary upon questions of fact in cases involving the public lands are "conclusive" in the courts. We do not undertake to decide whether this is so since, at the very least, the Secretary's findings of fact ought to be upheld if they are supported by substantial evidence.[4] They are so supported in this case.

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[4]This is the general test applied with respect to the sufficiency of the evidence to support administrative findings of fact. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 207. See also, *Adams v. United States*, 9 Cir., 318 F.2d 861, 873; and *Standard Oil Co. of California v. United States*, 9 Cir., 107 F.2d 402, 414, applying the substantial evidence test in public land cases.

In both the Palmer and Penny cases the agency produced expert testimony tending to prove that the sand and gravel deposits were not marketable and were otherwise without "value" in the sense intended by 30 U.S.C. § 22. The Corporation attacks the expertise of the Government witnesses and also the extent of their information concerning these particular lands. It also produced conflicting testimony with regard to the Palmer claims, but offered no evidence concerning the Penny claims.

As stated above, the hearing examiner found that six of the claims in the Palmer case were valid. These were claims numbers 52 through 57. The examiner found that these claims are located upon land which has high value for homesite purposes. As the examiner acknowledged, this finding gave application to the rule that where such circumstances are shown, proof of the mineral value of the deposit must be specific, clear and unequivocal.[5] Nevertheless, after weighing the conflicting evidence as to these six claims, the hearing examiner found that the sand and gravel deposits had the required value and concluded therefrom that those six claims are valid.

On his review of the hearing examiner's decision in the Palmer case, the Director of the Bureau reviewed the evidence adverted to by the examiner and found to the contrary concerning the value of the deposits on these six claims. Among other things, the Director found, in effect, that even in the claim Number 54 area, which was potentially the most valuable in this

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[5]See *United States v. Lillibridge*, S.D. Cal., 4 F.Supp. 204, 206; *United States v. Lavenson*, W.D. Wash., 206 F.2d 755; *Helen v. Wells*, 54 I.D. 306, 309 (1933).

group, the gravel is coated with a calcareous substance and is used only for road, parking lot and fill purposes. The Director also found that the market for materials of this quality in the Las Vegas area is "conjectural rather than actual or prospective." The Director accordingly concluded that these six claims, along with the other twenty-two claims in the Palmer case and the eight claims in the Penny case, are null and void.

The office of the Secretary affirmed the decision of the Director. In discussing the six claims of the Palmer case with regard to which the Director had set aside the examiner's finding of adequate value, the office of the Secretary pointed out that marketability had to exist prior to July 23, 1955, in order to fulfill the "present marketability" test. On that date, under 60 Stat. 368 (1955), as amended, 30 U.S.C. § 611 (1964), no deposits of "common varieties" of sand, stone, gravel, pumice, pumicite or cinders may be deemed a valuable mineral deposit within the meaning of the mining laws of the United States. The office of the Secretary found, in effect, that in view of the evidence, considered as a whole, no market for the sand and gravel on these six claims existed prior to July 23, 1955.[6]

In our opinion the findings of fact supporting the agency determination that all of the Palmer and Penny claims here in question are null and void are supported by substantial evidence.

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[6]The office of the Secretary further found that the only evidence of the existence of a market for the sand and gravel in these claims is in ". . . reference to a prospective market which may develop as a result of a future road building program under the Federal Highway Act."

The Corporation argues that the district court judgment setting aside the agency decision should be affirmed because the agency records are faulty and incomplete. We have looked into this matter and find the contention to be without merit. The omissions are minor, have no relevance to the issues before us, and are not, in our view, prejudicial.

The Corporation contends that the district court properly rejected the agency determination invalidating the Penny claims because the contest proceedings involving those claims were not commenced within the two-year period assertedly required by the proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1098 (1891), as amended, 43 U.S.C. § 1165 (1964). However, as defendants point out, the Act of March 3, 1891 applies only to entrymen under the homestead, timber-culture, desert-land or pre-emption laws. It has no application to the mining laws or to persons making claims under the mining laws.

The judgments are reversed and the causes are remanded with directions to enter judgments for the defendants. As indicated above, the responsibility for this reversal rests with this court because of its erroneous decision in *Coleman,* which decision the district court was required to follow at the time the cases were before it.